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IN THE

Supreme Court of the United States

Parents Involved in Community Schools, *Petitioner*,
v.
Seattle School District No. 1 et al., *Respondents*.
and
Crystal Meredith, *Petitioner*,
v.
Jefferson County Board of Education et al., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals
for the Ninth and Sixth Circuits, Respectively

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are eight organizations that share a deep commitment to ensuring that all children receive a high-quality education that fully prepares them to succeed as productive citizens in our society. As part of that commitment, *amici* strongly support the efforts of local school boards to take measures that seek to foster the educational benefits of a racially diverse learning environment in elementary and secondary public education. A complete list of the *amici*, along with their specific statements of interest, is set forth in the appendix to this brief.

SUMMARY OF ARGUMENT

Local control of elementary and secondary education through local school boards is deeply engrained in our nation's history. In light of this long tradition, this Court generally has deferred to the judgments of local school boards and granted them broad discretion to chart education policy for the communities they serve. In maintaining that position of deference, this Court repeatedly has stressed that local control spurs innovation, democratic accountability, and, ultimately, sound education policy.

That same deferential stance also is warranted for race-conscious student assignment policies adopted by local school boards to foster the benefits of a racially diverse learning environment in elementary and secondary public education. Such policies are in step with this Court's school desegregation precedents, which afford latitude to local

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[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than counsel for *amici* has made a monetary contribution to the preparation and submission of the brief.

school boards to undertake voluntary efforts to overcome the pervasive *de facto* public school segregation that is attributable to demographic trends. These efforts to integrate our pubic schools are worlds apart from constitutionally forbidden systems of deliberate racial separation and stigmatization. And they are markedly distinct from race-conscious measures in other contexts that have been subjected to strict judicial scrutiny in this Court's affirmative action precedents.

Even if it were to apply here, strict scrutiny should accommodate a level of deference to the determination of local school boards, which is anchored in a strong empirical foundation, that a racially diverse learning environment has a profoundly positive impact on all students. The United States' *amicus* briefs in these cases mischaracterize the student assignment policies at issue as nothing but racial balancing. In adopting such policies, local school boards across the country are not seeking diversity for diversity's sake. Rather, they are striving to achieve the concrete educational and lifelong benefits that flow from racially diverse schools.

The United States' version of the narrow tailoring component of strict scrutiny has no moorings in this Court's precedents. It would effectively handcuff local school boards and divest them of essentially all discretion to develop and implement measures, suited to the particular needs and circumstances of their communities, to reduce the racial isolation of public schools by seeking the benefits of a racially diverse learning environment. In the end, the United States' approach to narrow tailoring would give judges carte blanche to override the judgments of local school boards and thereby compromise the innovation, accountability, and sound education policy that this Court consistently has said flows from local control of public education through the nation's school boards.

ARGUMENT

I. The Tradition of Local Control of Public Education Gives Local School Boards Wide Discretion to Adopt Student Assignment Policies That Seek to Foster the Benefits of a Racially Diverse Learning Environment in Grades K-12.

A. Local Control of Public Education Confers on School Boards the Primary Responsibility for Charting the Nation's Education Policies in Grades K-12.

Time and again, this Court has admonished that the operation of the nation's elementary and secondary public schools (covering kindergarten through twelfth grade, or K-12) is committed principally to local school boards. Indeed, "[n]o single tradition in public education is more deeply rooted than local control." *Milliken v. Bradley*, 418 U.S. 717, 741 (1974); *see also Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) ("[O]ur cases have . . . firmly recognized that local autonomy of school districts is a vital national tradition.").

This Court also has long emphasized "the importance of education to our democratic society." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see also Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) ("We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' . . . .") (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)). Local control of public education thus squarely places on local school boards a profound and challenging responsibility: "educati[ng] . . . the youth of our country during their most formative and impressionable years." *Bd. of Educ. v. Pico*, 457 U.S. 853, 894 (1982) (Powell, J., dissenting).

In carrying out that vital function, local school boards must necessarily address a panoply of education policy issues.

As Justice Powell (himself a former local school board president) observed, local school boards are tasked with both "long-range planning as well as the daily operations of the public school system." *Keyes v. Sch. Dist. No. 1, Denver*, 413 U.S. 189, 227 (1973) (Powell, J., concurring in part and dissenting in part). This expansive charter thus calls on local school boards to confront matters that run the gamut from establishing a curriculum to making schools safe and secure, and from hiring superintendents and other administrators to enhancing student achievement in classrooms and on standardized tests. *See generally* Frederick M. Hess, School Boards at the Dawn of the 21st Century (2002), http://www.nsba.org/site/docs/1200/1143.pdf.[2]

In recognition of the primacy of local control, this Court consistently has stated that local school boards have wide discretion in charting education policy for their communities. *See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969). Accordingly, the Court typically has reviewed legal challenges to school board actions with substantial deference.

B. Local Control of Public Education Through School Boards Promotes Innovation, Accountability, and Sound Education Policy.

In maintaining its posture of deference to local school boards, this Court has identified three core, salutary effects of local control over public education: innovation, accountability, and sound education policy.

1. Local Control and Innovation

This Court repeatedly has stated that local control of public education encourages innovation. *See, e.g., Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991); *San Antonio*

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[2] Given this wide range of duties, it is not surprising that membership on a local school board entails an extensive commitment of time and energy, especially in larger school districts. *See* Hess at 17.

Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49-50 (1973). A local school board knows firsthand the community that it serves: its members are, by and large, part of that community. That school board members work in the communities in which they live makes it "fair to say that no single agency of government at any level is closer to the people whom it serves than the typical school board." *Pico*, 457 U.S. at 894 (Powell, J., dissenting). And precisely because they are so near to the center of educational gravity, local school boards are uniquely positioned to craft policies that are suited to the needs and interests of their particular communities.

Experimentation by local school boards with respect to educational policy is especially valuable in light of the wide variety of differences among communities in the nation. In short, education policy is not a monolith in America, and one-size-fits-all prescriptions are rare. *See* Nat'l Working Comm'n on Choice in K-12 Educ., School Choice: Doing It The Right Way Makes A Difference, 14-15 (2003), http://www.brookings.edu/gs/brown/20031116schoolchoicereport.pdf [hereinafter School Choice].

Chief Judge Boudin made that very observation in *Comfort v. Lynn School Committee*, 418 F.3d 1 (1st Cir. 2005), which, like the instant cases, involved a challenge to a local school board's student assignment policy that sought to achieve the benefits of a racially diverse learning environment. In that case, Chief Judge Boudin stressed that, when it comes to educational matters, a distinct "advantage[] of our federal regime is that different communities [can] try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs." *Comfort*, 418 F.3d at 28 (Boudin, C.J., concurring). Applying that principle, Chief Judge Boudin voted to sustain the Lynn school board's "local experiment," which, he said, "pursu[ed] plausible goals by novel means that are not squarely condemned by past Supreme Court precedent." *Id.* at 29.

To be sure, the federal government has a say in education policy. But it is generally accepted that federal authorities, including members of the judiciary, are simply not as well-situated as local school boards to decide what is best for a public school district at a particular point in time. Judge Kozinski placed great weight on this proposition in voting to uphold the Seattle school board's student assignment policy at issue here. Specifically, Judge Kozinski emphasized that school board members, "who are much closer to ground zero than [judges] are[,] . . . understand the realities of the situation far better than we can, no matter how many depositions and expert reports we may read in the quiet of our chambers." Parents Involved in Community Schools, Petitioners' Appendix 69a [hereinafter PICS Pet. App.]. Judge Kozinski's refrain of judicial restraint, so as to spur innovation in education through local control, is echoed in this Court's precedents rejecting constitutional challenges to local education policy. *See, e.g.*, *Rodriguez*, 411 U.S. at 43 ("[T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.").

The experimentation that is bred by local control of public education is manifested here in the form of Respondents' school choice plans, which strive to achieve the benefits of a racially diverse educational environment through innovative assignment policies that provide a degree of choice of schools within the district, commensurate with the particular needs and concerns of the entire communities served by the boards. Under these policies, parents and their children can select their neighborhood school, yet are not confined to that option. Policies that maximize choice, and at the same time seek to integrate the schools, are increasingly commonplace. Indeed, a number of larger school districts now "offer parents relatively unconstrained choices among

public schools within the district," School Choice at 14, with Seattle furnishing "one of the most comprehensive open choice plans in the country," *id.* at 15.

2. Local Control and Accountability

This Court has touted the democratic accountability that is fostered by local control of education. *Freeman v. Pitts*, 503 U.S. 467, 490 (1992); *Dowell*, 498 U.S. at 248. There are two key aspects to the accountability of local school boards. First, local school boards are answerable to their communities through the electoral process. Second, community input plays a significant role in the decisionmaking of local school boards.

The vast majority of local school boards—ninety-three percent according to a recent survey—is popularly elected by voters in local school districts. Hess at 32. Furthermore, local school board members periodically are required to face the voters; more than ninety percent of members serve terms of no more than four years. *Id.* at 28. Like all elected officials, therefore, local school board members must be responsive to constituent concerns if they wish to be reelected. But perhaps more than any other politically accountable body, local school boards are "uniquely . . . democratic institutions." *Pico*, 457 U.S. at 894 (Powell, J., dissenting). This is because a school board's most important constituents are parents whose children attend the local public schools governed by the board.

> In most public schools in the United States the *parents* have a large voice in running the school. Through participation in the election of school board members, the parents influence, if not control, the direction of their children's education. A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly "of the people and by the people."

Id. at 891 (Burger, C.J., dissenting). In light of this special relationship between local school boards and their constituents, it is hardly a stretch to conceive of "local control of education [as] democracy in a microcosm." *Id.*

Local school board elections themselves are arguably more democratic than legislative elections in a key respect—the rate of successful challenges to incumbents. In fact, a higher percentage of incumbents is unseated in local school board races than in United States congressional races. Hess at 36. The accountability of local school boards through contested elections counsels against aggressive judicial intrusion into the management of public schools. Such precipitous action "would deprive the people of control of schools through their elected representatives." *Milliken*, 418 U.S. at 744.

Local control over education policy promotes democratic accountability not just by rendering school board members answerable to constituents at the polls, but also by encouraging parental involvement in setting local education policy. Indeed, local control "has long been thought essential . . . to the maintenance of community concern and support for public schools." *Milliken*, 418 U.S. at 741.

This engagement between a local school board and its community "takes many forms" throughout the country today. *See* Michael A. Resnick, Nat'l Sch. Bds. Ass'n, Communities Count: A School Board Guide to Public Engagement 2 (2000). Some school boards conduct focus and study groups with parents; others hold large public meetings; and still others actively communicate with constituents through electronic mail, public-access cable television, or other technologies. *Id.* at 15-18. *See generally* Anne Wright & Judith Brody Saks, Nat'l Sch. Bds. Ass'n, The Community Connection: Case Studies in Public Engagement (2000) (profiling the community involvement strategies implemented in fifteen different school districts). Overall, there is no uniform method by which local school boards engage with

the public. But the goal of public engagement by local school boards is the same everywhere: to forge ties with the community the school board serves, in a collaborative effort to enhance the quality of public education there.[3]

The democratic accountability that flows from local control of public education is very much in evidence in Jefferson County and Seattle.[4] School board members in

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[3] Local school boards are particularly accountable to parents with respect to student achievement. *See* Hess at 9, 14, n.7. This accountability is measured, in part, by reference to the standards of the federal No Child Left Behind Act ("NCLBA"), Pub. L. No. 107-110, 115 Stat. 1425 (2001). That statute requires states, local school districts, and individual schools to assess student achievement for all students at various grade levels across a range of subjects. It also requires incremental improvement in test scores at a certain rate to ensure "adequate yearly progress." Pub. L. No. 107-110, § 1111, 115 Stat. at 1445-46. What steps local school districts take to achieve "adequate yearly progress" is largely a matter of local control under the NCLBA, unless the steps taken fail to produce results. Notably, the NCLBA requires states to measure the achievement of "students from major racial and ethnic groups." Pub. L. No. 107-110, § 1111(b)(2)(C)(v)(II)(bb), 115 Stat. at 1446. As local school districts strive to raise the test scores of particular racial groups in order to meet their states' achievement goals, they need the flexibility to develop and implement solutions, including student assignment plans, that are most likely to work given the particular circumstances in their communities. All told, Petitioners fail to acknowledge the significant accountability of local school districts for the achievement of all students and the importance of local control in meeting these obligations.

[4] The policies adopted by the Board of Education in Jefferson County can be found in Bd. of Educ. of Jefferson County, Policy Manual § BBB (2004), *available at* http://www.jefferson.k12.ky.us/Departments/GeneralCounsel/boardpolicy0702.pdf [hereinafter Policy Manual]. The policies and bylaws adopted by the Seattle School District No. 1 are indexed online: Seattle Sch. Dist. No. 1, Board Policies and Procedures, *available at*

Jefferson County are elected by voters to terms of four years. Ky. Rev. Stat. § 160.200(1) (2006); Policy Manual § BBB. The same is true in Seattle. Policies and Procedures, Bylaw B03.00 (Aug. 2005). In Jefferson County, the school board holds twenty-one meetings a year that are open to the public and broadcast on a local cable television channel. *See* Jefferson County Public Schools, Board of Education, About Us, http://www.jefferson.k12.ky.us/Board/BOE.html#Anchor-When-35882 (last visited Oct. 8, 2006). Similarly, the Seattle school board generally meets twice a month in sessions open to the public. *See* Seattle Public Schools, School Board Meeting Schedule, http://www.seattleschools.org/area/board/schedule.xml (last visited Oct. 8, 2006); *see also* Policies and Procedures, Bylaw B40.00 (Aug. 2005); Policies and Procedures, E06.01 (Feb. 2003). In Jefferson County, any member of the public may register to address the school board at the open meetings. Policy Manual § BDDH. Meeting agendas are available to the public before each meeting, Policy Manual § BDDC, and the board makes the minutes of past meetings available to the public, Ky. Rev. Stat. § 160.270(2) (2006). Meeting minutes record each vote taken by the board and identifies yeas, nays, and absences by the name of each board member. Policy Manual § BDDG. Much is the same in Seattle. There too, an agenda must be made available to the public prior to each board meeting, and any member of the public may address the school board during the "Public Testimony" portion of the meeting. Policies and Procedures, E06.01 (Feb. 2003). And board resolutions and meeting minutes, complete with a record of board members' votes, are available online. Seattle Public Schools, School Board, http://www.seattleschools.org/area/board/index.xml (last visited Oct. 8, 2006).

More fundamentally, the accountability that is attendant to local control is underscored by the very student assignment

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http://www.seattleschools.org/area/policies/index.dxml [hereinafter Policies and Procedures].

policies at issue. In Jefferson County, public participation has shaped the school board's efforts to move from a system of *de jure* racial segregation in the public schools to a racially integrated system. In 1984, for example, community engagement led the school board to develop policies intended to foster racial balance in the schools in the face of demographic trends that contributed to racial imbalance. *See Hampton v. Jefferson County Bd. of Educ.*, 72 F. Supp. 2d 753, 766 (W.D. Ky. 1999). In the same vein, public engagement subsequently enabled the school board to arrive at a community consensus and formulate a "managed choice" school assignment plan in 1996. *Id.* at 767; Meredith, Petitioner's Appendix C-15. And the current plan is responsive to a formal opinion survey and five public forums conducted by the Jefferson County school board. J.A. 106-08.

Likewise, the Seattle school board has engaged with the public in developing and implementing a series of different student assignment plans designed to combat the effect of residential segregation patterns on the racial make-up of the city's schools. *See* PICS Pet. App. 269a-70a. At one stage, for instance, the school board implemented a policy of mandatory busing. That action met with "widespread dissatisfaction," *id.* 270a, and led voters in the city to attempt to recall board members who voted for the plan. The recall effort failed by a narrow margin. *Seattle Sch. Dist. No. 1 v. Washington*, 473 F. Supp. 996, 1006 (W.D. Wash. 1979). The public debate did not cease with that campaign. Instead, citizen participation through the years has led the school board to consider and experiment with student assignment plans in an attempt to balance the goal of racially diverse schools with the public's concerns about displacing parental choice. The board's current student assignment policy, which offers parents and students a broad choice of which school to attend, reflects the fruits of the board's consistent engagement with its constituents over time. *See* PICS Pet. App. 270a.

3. Local Control and Sound Policy

The innovation and accountability that come with local control of public schools are generally thought to produce sound educational policies. *See Milliken*, 418 U.S. at 742 (local control encourages "a healthy competition for educational excellence.") (internal quotation marks omitted). The facility of local school boards to make more prudent decisions for their communities than geographically distant officials (state or federal) may be rooted in the fact that unlike other government bodies, school boards concentrate on education, and education alone. *Pico*, 457 U.S. at 894 (Powell, J., dissenting). This intense focus on one general subject area enables local school boards to develop a breadth of particularized knowledge and to apply that knowledge to the circumstances on the ground in their communities.

The expertise that the Jefferson County Board of Education brings to bear on education issues is illustrative. The superintendent, who serves as the chief executive officer of the school board, must have a minimum of ten years of experience as an educator. Policy Manual § CBA. Board members themselves must undergo a substantial amount of training. Members who have been on the board for three or fewer years must participate in twelve hours of training each year. Ky. Rev. Stat. § 160.180(5)(a) (2006). For board members with four to seven years of experience, eight hours of training is required annually. *Id.* at § 160.180(5)(b). And for board members with eight or more years of experience, four hours of training is required annually. *Id.* at § 160.180(5)(c). In addition, a premium is placed on board member attendance at conventions and workshops where ideas on education policy are exchanged, and on board member review of professional journals and papers. Policy Manual § BHB.

The extensive training that the Jefferson County school board members receive is mirrored in local school boards nationwide. A recent survey found that most local school

board members are highly trained in a number of substantive areas, particularly in the subjects of board member roles and responsibilities and board member accountability. *See* Hess at 18.

In the end, local school board polices are not blind experiments in social engineering. In crafting solutions to the problems they encounter, local school boards engage in a complex decisionmaking process. They evaluate academic research and weigh all sides of an issue in an effort to ensure that there is a strong empirical foundation for their judgments. They give substantial consideration to community values and interests. And they carefully deliberate over the best approach to the problem at hand before making a final determination.

Local school boards are not infallible. As a nation, however, we continue to trust local school boards to develop sensible education policies, designed to meet the particularized needs and concerns of their communities.

C. Student Assignment Policies That Use Racial Criteria to Foster the Educational Benefits of a Racially Diverse Learning Environment Are Matters of Local Control of Public Education Committed to the Discretion of Local School Boards.

The assignment of students to schools is a quintessential matter of local control that generally should be left to the discretion of local school boards. This is also true of student assignment policies, like those at issue here, that consider race to a limited extent in the assignment equation to achieve the educational benefits of a racially diverse learning environment in K-12 public education. Our view on this score is informed by this Court's desegregation precedents, which indicate that the exercise of local control over public education gives school boards latitude to adopt voluntary measures to foster racial integration and thereby create a more racially diverse learning environment.

From the outset of its cases involving the desegregation of public schools that were segregated by the force of state and local law (including in *Brown* itself), this Court stressed that "federal supervision of local school systems was intended as a temporary measure to remedy past discrimination." *Dowell*, 498 U.S. at 247; *see also id.* ("*Brown* considered the 'complexities arising from the *transition* to a system of public education freed of racial discrimination' . . . .") (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955) (*Brown II*)) (emphasis added in original). Even where courts stepped in and oversaw the pace of compliance with *Brown*'s desegregation mandate, the goal always was a return to local control. *Freeman*, 503 U.S. at 489-90.

With the passage of time, it has become increasingly less likely that racial imbalances in public schools in formerly *de jure* segregated systems can be attributed to the vestiges of an old, unconstitutional regime, as opposed to demographic trends. *Id.* at 496. In delineating the constitutional standard for student assignment policies for those school districts, this Court stated that "[o]nce the racial imbalance due to the *de jure* violation has been remedied, the school district is under no *duty* to remedy imbalance that is caused by demographic factors." *Id.* at 494 (emphasis added).

But while the Court has held that the Constitution imposes no obligation on local school boards to cure racial imbalances that are not vestiges of *de jure* segregated systems, it also has suggested that local school boards have the discretion—in the exercise of local control over public education—to decide *voluntarily* to adopt student assignment policies that seek to achieve, through greater racial integration in the schools, the educational benefits of a diverse learning environment. In other words, the Constitution acts primarily as a desegregation floor, rather than a desegregation ceiling.

Justice Powell articulated this principle in a case involving a school district in a non-*de jure* state that nevertheless was found to have intentionally segregated some

of its schools in contravention of *Brown*. He said that boards in such districts should, on their own accord, be "free to develop and initiate . . . plans to promote school desegregation" that would "exceed[] minimal constitutional standards in promoting the values of an integrated school experience." *Keyes*, 413 U.S. at 242 (Powell, J., concurring in part and dissenting in part); *see also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) ("School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . . ."); *N.C. Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) ("[A]s a matter of educational policy school officials may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements."). Nothing in this Court's most recent school desegregation decisions, *Dowell* and *Freeman*, saps the authority of local school boards in formerly *de jure* systems to undertake voluntary efforts to integrate the schools. Indeed, with their strong commitment to local control of public education, those cases signal that local school boards have leeway to seek voluntarily the benefits of racial diversity through student assignment policies.

Because *de jure* segregation was the rule in Kentucky schools prior to *Brown*, the student assignment policies of Respondent Jefferson County Board of Education were, for many years, enmeshed in questions of compliance with the desegregation requirements of *Brown*. Court-ordered school desegregation in Jefferson County eventually was dissolved in light of this Court's decisions in *Freeman* and *Dowell*. *See Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 376-77 (W.D. Ky. 2000). But after the termination of judicial oversight, the Jefferson County Board of Education

did not call a halt to integration. To the contrary, it determined that integration went hand-in-hand with a quality education, and, in step with this Court's school desegregation rulings, it voluntarily adopted, in an exercise of local control, a student assignment plan that seeks to promote a racially diverse learning environment. Meredith Pet. App. C-16 to C-17.

Elsewhere in the country, student assignment issues have been intertwined with efforts to integrate the public schools in districts, like Seattle's, where *de jure* segregation was not practiced, but where *de facto* segregation of the schools pervaded because of residential segregation patterns that were reinforced by policies that assigned students to neighborhood schools. Here too, the Court has said—and in a case involving Respondent Seattle School District No. 1 no less—that local control over public education generally leaves it to local officials to decide whether, on their own volition, to adopt student assignment polices targeted at overcoming *de facto* segregation of the public schools. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474 (1982); *see also Bd. of Educ. v. Harris*, 444 U.S. 130, 141-42 (1979) (noting congressional efforts to encourage voluntary measures to integrate public school systems that were *de facto* segregated).

This theme of voluntary school integration, through local control of public education, to overcome *de facto* segregation in non-*de jure* systems resonates in Chief Judge Boudin's concurrence in *Comfort*. That case came out of Lynn, Massachusetts, which, like Seattle, is a city without a history of *de jure* racial segregation of the public schools. But, as was true in Seattle, the public schools in Lynn were *de facto* racially segregated on account of residential segregation. *Comfort*, 418 F.3d at 29 (Boudin, C.J., concurring) ("The problem is that in Lynn, as in many other cities, minorities and whites often live in different neighborhoods."). Like Seattle, Lynn sought, through a student assignment policy, "to preserve local schools as an option without having the

housing pattern of *de facto* segregation projected into the school system." *Id.* In voting to uphold the policy, Chief Judge Boudin stated that its ultimate wisdom was a matter of local control for the Lynn school board, and the voters in Lynn to whom the board answers, not the courts. *See id.* at 28.

This Court did, of course, override the paeans to local control of education policy made initially by the local school boards in defense of racial segregation of public schools, *Brown*, 347 U.S. at 493, and then later by local school boards in defense of "freedom of choice" student assignments plans, which the Court saw as subterfuges to maintain a dual education system. *Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968). But the student assignment policies at issue here are a far cry from the local school board actions struck down in *Brown* and *Green*.

The overarching purpose of dual education systems was flat-out separation of the races. *See Swann*, 402 U.S. at 6 (*de jure* racial segregation reflected "a government policy to separate pupils in schools solely on the basis of race."). In dividing students along racial lines, local school boards also stigmatized black children, who were relegated to separate and inherently unequal public schools. *Brown*, 347 U.S. at 494-95; *see also United States v. Fordice*, 505 U.S. 717, 754 (1992) (Scalia, J., concurring in part and dissenting in part) ("The constitutional evil . . . in *Brown I* was that blacks were told to go to one set of schools, whites to another. What made this 'even-handed' racial partitioning offensive to equal protection was its implicit stigmatization of minority students . . . ."") (internal quotation marks omitted). And this system created and perpetuated noxious racial stereotypes. *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

The student assignment policies adopted by local school boards to produce a racially diverse learning environment are the antithesis of the system of *de jure* racial segregation once administered by local school boards. These policies seek to

sow racial unity, not to breed racial fissures. They seek to eradicate the stigma of racial inferiority, not to spawn it. They seek to break down racial stereotypes, not to build them. And they seek to celebrate our nation's racial diversity, not to condemn it.

Moreover, while they sometimes do take race into account in the student assignment process, such policies are markedly different from the race-conscious measures in higher education, public contracting, public employment, and legislative redistricting that this Court heretofore has addressed in its affirmative action precedents beginning with *Bakke*.[5] Judge Kozinski succinctly captured these distinctions in his opinion concurring in the Ninth Circuit decision sustaining Seattle's race-conscious student assignment policies against constitutional attack. He wrote that, unlike the race-conscious measures that this Court previously has considered, under the Seattle student assignment policies:

> There is no attempt to give members of particular races political power based on skin color. There is no competition between the races, and no race is given a preference over another. That a student [may be] denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability.

PICS Pet. App. 65a. All told, Judge Kozinski stated, the Seattle student assignment policy merely "gives the American melting pot a healthy stir without benefitting or burdening any particular group." *Id.* at 70a. And in that way, he recognized, the policy lacks the trappings of the race-conscious measures that have been subjected to strict judicial scrutiny in affirmative action cases. *Id. at* 63a-65a. Accordingly, in Judge Kozinski's view, the policy should not be examined under strict scrutiny, but rather, under a more

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[5] *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978).

lenient standard that cabins the power of courts to upset decisions reached through local control of public education. *Id.* at 65a-66a.

We agree with Judge Kozinski with respect to the standard of review, and therefore urge this Court to refrain from reflexively applying strict scrutiny simply because the student assignment policies at issue here consider race to a limited extent. But, even if it is applied, strict scrutiny should not be fatal to these policies. As the Court stressed in *Grutter*:

> Context matters when reviewing race-based governmental action under the Equal Protection Clause. . . . Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.

Grutter, 539 U.S. at 327. With that principle firmly in mind, the Court in *Grutter* stated that strict scrutiny could accommodate "a degree of deference to a university's academic decisions," *id.* at 328, deference that was grounded in traditional judicial respect for the "educational autonomy" of a university to pursue its "institutional mission," *id.* at 329. The Court concluded in *Grutter* that "attaining a diverse student body is at the heart" of that mission, and thus held that universities have a compelling interest in achieving that diversity. *Id.* at 329.

Context counts in these cases as well. Traditional judicial respect for local control of public education by local school boards provides the backdrop for the constitutional challenge to the consideration of race in the Seattle and Jefferson County student assignment policies. As in the higher education context in *Grutter*, application of strict scrutiny in the context of K-12 public education should not

preclude this Court from reviewing those policies with an appropriate level of deference to the considered judgment of the local school boards that the policies are essential to their institutional mission: to provide a quality public education to all children by equipping them to be successful and productive adults in our diverse nation.

The United States contends that the deference afforded to higher education institutions in *Grutter* is unwarranted in the elementary and secondary education context because, according to the United States, Respondents have not made judgments about the pedagogical rationale for diversity, but rather, seek diversity solely to achieve racial balance in the schools. Brief for the United States as *Amicus Curiae* Supporting Petitioner at 15-16 & n.5, *Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1*, No. 05-908 (2006) [hereinafter U.S. Br., *PICS*]; Brief for the United States as *Amicus Curiae* Supporting Petitioner at 13-15, *Meredith v. Jefferson County Bd. of Educ.*, No. 05-915 (2006) [hereinafter U.S. Br., *Meredith*]. That is incorrect. After careful study and analysis of the matter, scores of local school boards across the country (including Respondents) have concluded that a racially diverse learning environment provides demonstrably better educational opportunities for all students, and that consigning students (either minority or nonminority) to racially segregated schools tends to have negative lifelong consequences for them. In reaching that conclusion, local school boards have evaluated and tapped into an impressive body of scholarship.[6] In sum, the nation's

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[6] This social science evidence, described in detail in the briefs of Respondents, is not discussed here. We do note one important new study that demonstrates the positive correlation between student achievement and school choice plans that seek to promote a racially diverse learning environment. *See* Douglas N. Harris, Lost Learning, Forgotten Promises: A National Analysis of School Racial Segregation, Student Achievement, and "Controlled Choice"

local school boards are not seeking diversity for diversity's sake (which would be tantamount to racial balancing). Transcending the mere achievement of diversity itself, they seek to provide the concrete and tangible educational benefits of a racially diverse learning environment.

II. The United States' Treatment of the Narrow Tailoring Test Is Not Supported by This Court's Precedents and Would Compromise Local Control of Public Education.

If strict scrutiny is applied here, Respondents' student assignment policies satisfy that standard's requirement that race-conscious measures be narrowly tailored to accomplish their purpose. Respondents make this case in their briefs, and we do not repeat those arguments here. Our focus instead is on the United States' treatment of the narrow tailoring test, which is at odds with this Court's precedents and would strip local school boards of virtually all discretion to use race-conscious measures when necessary to achieve the benefits of a racially diverse learning environment in K-12 education.

First, the United States' discussion of the "race-neutral alternatives" element of the narrow tailoring test is incomplete. It ignores the tenet that "[n]arrow tailoring does not require exhaustion of *every conceivable* race-neutral alternative." *Grutter*, 539 U.S. at 339 (emphasis added). Rather, it requires only "serious, good faith consideration of *workable* race-neutral alternatives." *Id.* (emphasis added); *see also Billish v. Chicago*, 989 F.2d 890, 894 (7th Cir.) (en banc) (Posner, J.), *cert. denied*, 510 U.S. 908 (1993). The United States advances some race-neutral measures that it says Respondents should have considered and tried. The United States does not show, however, that those measures would have been workable given the particular circumstances of Seattle and Jefferson County. Furthermore, the United

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Plans (forthcoming Nov. 2006), *available at* http://www.americanprogress.org.

States does not dispute that, alongside race-conscious means, Respondents have considered, implemented, and still use a host of race-neutral means to achieve their interest in a racially diverse learning environment. The United States cites no legal authority and offers no reason precluding local school boards from employing a combination of race-neutral and race-conscious action to achieve that interest.[7]

The United States' invocation of the federal Magnet Schools Assistance Program (MSAP) as a "potential race-neutral alternative[] available to school districts" is misplaced. *See* U.S. Br., *PICS* at 25; *see also* U.S. Br., *Meredith* at 22 n.8. As the United States admits, Seattle participated in the MSAP from 1998 through 2001, and has established magnet schools. U.S. Br., *PICS* at 27 n.9. Magnet schools also are a staple of Jefferson County's school choice policy. Meredith Pet. App. C-20 to C-22. That both Seattle and Jefferson County incorporate magnet schools in their school choice tool kits does not, however, mean that the MSAP is the be-all and end-all towards reaching the goal of a racially diverse learning environment. The MSAP is just one option a local school board has at its disposal. The United States Department of Education itself concedes that the MSAP has resulted in only "modest progress" in achieving racial integration in public schools. Policy & Program Studies Serv., U.S. Dep't of Educ., Doc. No. 2003-15, Evaluation of the Magnet Schools Assistance Program, 1998 Grantees: Final Report VI-2 (2003), *available at* http://www.ed.gov/rschstat/eval/choice/magneteval/finalreport.pdf. The Department further concedes that one possible

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[7] The United States claims that the fact that the Seattle school board has not considered race in student assignments for several years shows that it is unnecessary to use race in Seattle. But that fact is a narrow-tailoring plus, not a minus, for it highlights that the school board is, consistent with this Court's precedents, using race only as "a last resort." *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring).

explanation for the program's limited success may be the constraints it places on the ability of participating school districts to use race in making student assignments. *See id.* at VI-12 to -13. Whatever the explanation, the MSAP is not the race-neutral panacea that the United States portrays it to be. In fact, the MSAP is not even wholly race-neutral: as the United States notes, the program permits participants to consider race in student placements in a narrowly tailored manner "to accomplish the objective of reducing, eliminating, or preventing minority group isolation." U.S. Br., *PICS* at 27 (internal quotation marks omitted).

Second, the United States argues that the use of race in Respondents' student assignment policies is "driven by the numbers," and hence amounts to rigid racial quotas that *per se* cannot be narrowly tailored. U.S. Br., *PICS* at 21; U.S. Br., *Meredith* at 20. Here, the United States wrongly conflates "attention to numbers," which is permissible, *Grutter*, 539 U.S. at 336 (quoting *Bakke*, 438 U.S. at 323), with the adoption of numerical quotas, which is impermissible. "Properly understood, a 'quota' is a program in which a certain fixed number or proportion of opportunities are reserved" on the basis of race, and which "must be attained, or which cannot be exceeded . . . ." *Grutter*, 593 U.S. at 335 (internal quotation marks omitted). As shown in Respondents' briefs, their student assignment policies do not fit this definition of a quota because they seek to attain a level of racial diversity that falls within a numeric range, rather than one that lands at a fixed number. The United States asserts that it "makes no difference" that Respondents assign students "in accordance with a fixed numeric range, rather than a single fixed number." U.S. Br., *PICS* at 22; U.S. Br., *Meredith* at 20. *Grutter* directly undermines that proposition.[8]

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[8] The United States ignores *Grutter* here. In support of its assertion, the United States cites Justice Douglas's dissent in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), and a single appellate

There, the Court stated that annual variations in the percentage of minorities admitted to the University of Michigan Law School from 13.5% to 21.1% reflected "a range inconsistent with a quota." 539 U.S. at 336. As set forth in Respondents' briefs, their numerical benchmarks accept an even greater statistical deviation than the figures in *Grutter*.

Third, the United States contends that Respondents' student assignment policies fail the durational limitation element of the narrow tailoring test because they do not have a definite end date. U.S. Br., *PICS* at 28-29; U.S. Br., *Meredith* at 23-24. In *Grutter*, however, this Court held that the absence of a fixed end-date for race-conscious admissions policies in higher education is not necessary. Rather, it suffices that those policies are subject to periodic review that ensures that they will be modified over time, and, eventually, will not be used if no longer needed. *Grutter*, 539 U.S. at 342. Respondents' student assignment policies meet that standard because they have undergone frequent review and refinement through the years. Likewise, school boards throughout the country regularly review student assignment policies as a matter of course to ensure that they meet the changing needs and expectations of the community.

The United States' objection to the lack of a specific end-date for the use of race in the Jefferson County student assignment policy rings particularly hollow. As recently as 2000, Jefferson County was under a constitutional mandate to maintain race-conscious student assignment policies to remedy the vestiges of *de jure* racial segregation in the school system. Indeed, at that time, the United States opposed lifting that constitutional obligation, arguing that the vestiges of the dual system had not yet been eradicated. U.S. Br., *Meredith* at 2 n.1. It is rather perverse for the United States to claim

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court decision, *Fishermen's Dock Coop., Inc. v. Brown*, 75 F.3d 164 (4th Cir. 1996).

now that policies that were constitutionally required not long ago are constitutionally forbidden today just because the school district cannot forecast with exactitude the precise date in the future when its goal of achieving the benefits of a racially diverse learning environment can be achieved without some consideration of race in the student assignment process.

In all, the United States would convert the narrow tailoring test into a judicial trump card that invariably would override the judgments of local school boards. The upshot is that local school boards would be shackled in their pursuit of the benefits of a racially diverse learning environment, and the innovation, accountability, and educational excellence that are fostered by local control of public education would be undermined. Ironically, this would occur when school boards are being held more accountable than ever for the academic achievement of students in every racial subgroup. While the narrow tailoring test ensures that the means chosen closely fit the stated goal of race-conscious action, *Croson*, 488 U.S. at 493 (plurality opinion), it is not a mechanism by which courts get to second-guess politically accountable officials at every conceivable turn. This Court has not applied the narrow tailoring test in that fashion in other contexts. *See Grutter*, 539 U.S. at 326 ("Strict scrutiny is not 'strict in theory, but fatal in fact.'") (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995)); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (plurality opinion) (The least restrictive means component of strict scrutiny in First Amendment cases should be applied "without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems."). To do so here in the context of elementary and secondary education would compromise local control of public education through the nation's school boards.

CONCLUSION

For the foregoing reasons, the judgments of the courts of appeals in these cases should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX: LIST OF *AMICI CURIAE*

Amici curiae include the following organizations:

The National School Boards Association is a non-profit federation that represents the nation's 95,000 school members who govern the 14,772 local districts across the United States.

The American Association of School Administrators represents the more than 13,000 public school administrators nationwide who seek to provide quality public education in their communities.

The National Association of Secondary School Principals represents middle and high school principals, assistant principals, and other school leaders nationwide, and seeks to give its members a voice on significant education issues.

The National Association of Elementary School Principals represents elementary school (K-8) and middle school principals nationwide and advocates on their behalf on key education issues.

The National Association of State Boards of Education is a non-profit organization that works to strengthen state leadership in educational policymaking, promote excellence in the education of all students, advocate equality of access to educational opportunity, and assure continued citizen support for public education.

The Horace Mann League of the United States of America strives to foster and strengthen American public schools and increase the esteem in which they are held since they serve as the cornerstone of our democracy..

The Association of School Business Officials International is a professional association that provides programs and services to promote the highest standards of public school business management practices, professional growth, and the effective use of educational resources.

Phi Delta Kappa International is a professional association for educators that promotes quality education, in

particular publicly supported education, as essential to the development and maintenance of a democratic way of life.